

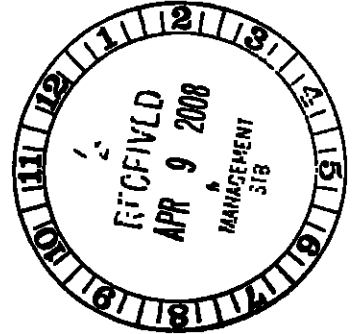
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Office of Proceedings

APR 09 2008

Part of
Public Record

8 April 2008
by express service



222028

Hon. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E St., SW
Washington, D.C. 20024

Re: PYCO Industries, Inc. - Feeder Line Application -
South Plains Switching Ltd. Co., F.D. 34890

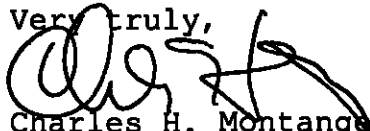
Motion for Leave/Reply to Motion to Strike

Dear Madam Secretary:

Enclosed on behalf of PYCO Industries, Inc. (PYCO) please find for filing in Finance Docket 34890 (feeder line proceeding) the original and ten copies of a Motion for Leave to File a recent BNSF pleading in Texas state court relevant to issues in this case, and a reply to an earlier motion to strike by SAW.

Thank you for your assistance in this matter.

Very truly,


Charles H. Montange
for PYCO Industries, Inc.

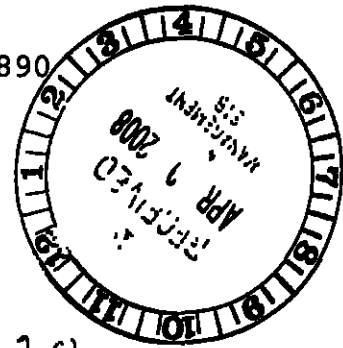
Encls.

cc. Mr. McFarland (SAW) (w/encls)
Mr. Heffner (WTL) (w/encls)
Mr. McLaren (PYCO) (w/encls)

BEFORE THE SURFACE TRANSPORTATION BOARD

PYCO Industries, Inc. --)
Feeder Line Application --) F.D. 34890
Lines of South Plains Switching, Ltd. Co.)

PYCO's Motion for Leave to File
Attached State Court Pleading
and
Reply to SAW Motion to Strike



Motion for Leave

PYCO Industries (PYCO) seeks leave to file the attached pleading, served April 2, 2008, by BNSF in a Texas state court proceeding brought by South Plains Switching Ltd. relating to some of the issues currently pending in this Finance Docket. In particular, in the pending state court litigation, SAW is claiming ownership and control over certain mainline switches needed to interchange traffic between BNSF and PYCO, or to serve PYCO's customers.

As our original Motion dated February 8, 2008, for clarification/enforcement indicated, SAW for some time has claimed ownership of various BNSF mainline switches needed to interchange with PYCO and/or to serve PYCO's customers. See Feb. 8 Motion, Attachment X. When SAW also sued PYCO claiming that PYCO's use of the switches was a trespass (PYCO Feb. 8 Motion, Attachment I), PYCO immediately turned to this Board for clarification that any SAW claim of title to the switches must be transferred to PYCO. One cannot operate a railroad if a hostile

party controls the switches necessary for that purpose; indeed, one wonders how BNSF could operate its Lubbock mainline if the switch system at Lubbock were now controlled by an entity like SAW with no interest in the discharge of any common carrier obligations. If SAW ever had an interest in the mainline switches, that interest obviously had to be conveyed to PYCO pursuant to the feeder line proceeding.¹

Once PYCO filed its February 8 Motion, SAW responded by taking a non-suit (voluntary dismissal without prejudice to re-file) in state court (see PYCO's Supplemental Memorandum dated Feb. 27, 2008, Exhibit A). But SAW contemporaneously reiterated and expanded if anything its claim to the switches in litigation against BNSF (id. Exhibit B).

BNSF has now moved to hold SAW's state court proceeding against BNSF in abeyance on the grounds that the switch issue is within this Board's primary jurisdiction, and that PYCO has presented the issue to this Board for resolution pursuant to our February 8 Motion. At the very least, BNSF's pleading demonstrates that SAW continues to seek to obstruct interchange between PYCO and BNSF through frivolous claims. BNSF's pleading is thus relevant to this Board's consideration of the issues in

¹ See Defendant's [BNSF's] Plea in Abatement served April 2, 2008, page 2, attached hereto, from South Plains Switching, Ltd. Vv. BNSF Railway Company, Dist. Ct. Lubbock County, 237th Judicial District.

this proceeding. PYCO accordingly requests leave to file the attached BNSF pleading in Finance Dkt. 34890.

Denial of Motion to Strike

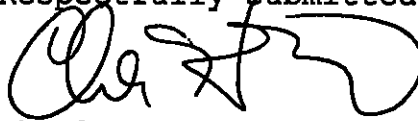
On March 24, 2008, South Plains Switching Ltd. (SAW) moved to strike a PYCO letter filed March 17, 2008, on the ground that the letter was a reply to a reply. In the second paragraph of the letter, PYCO sought leave to file in the event that the statement was so construed. SAW does not attempt to refute the grounds set forth by PYCO for granting such leave.

Following PYCO's successful feeder line acquisition, SAW has (in the words of BNSF) "continue[d] to harass BNSF and PYCO with frivolous claims...."² PYCO thinks about rail property, and treats this Board's decisions and orders, in a different fashion than SAW does, and it is hard for PYCO to anticipate all the specious claims or colorations that SAW will conjure up in reply to motions PYCO files in response to SAW's continued disruptive antics in Lubbock. Some ability to rebut claims by a party such as SAW is appropriate in the circumstances. Since the interests of the shipper community in Lubbock are at stake, since the issues involve this Board's orders, since PYCO in good faith wishes to provide common carrier services to shippers in Lubbock, and since the rail properties at issue here (the mainline switches and the Acme and "Burris" leads) are not only necessary

² BNSF Plea, attached, p. 2.

to those ends but also already paid for by PYCO to the extent still claimed by SAW, it is only prudent to at least attempt to provide the Board with a reasonably complete picture. For all these reasons, SAW's motion to strike should be denied.

Respectfully submitted,



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Seattle, WA 98177
(206) 546-1936
Counsel for PYCO Industries, Inc.

Of counsel:

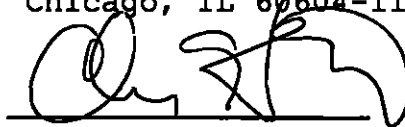
Gary McLaren
Phillips & McLaren
3305-66th St., Suite 1A
Lubbock, TX 79413

Atts:

BNSF Plea in Abatement, served April 2, 2008

Certificate of Service

I hereby certify service on April 8, 2008, by deposit for express next business day) delivery to Thomas McFarland, 208 South LaSalle St., Suite 1890, Chicago, IL 60604-1112 (for SAW and Choo Choo).



7-2-00
Fed Ex

CAUSE NO. 2007-539,788

SOUTH PLAINS SWITCHING, LTD. CO.	§ § § § § §	IN THE DISTRICT COURT OF LUBBOCK COUNTY, TEXAS 237 th JUDICIAL DISTRICT
v.		
BNSF RAILWAY COMPANY		

DEFENDANT'S PLEA IN ABATEMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, BNSF Railway Company ("BNSF"), to ask the Court to suspend these proceedings, and in support thereof BNSF would show the Court as follows:¹

L. SUMMARY

South Plains Switching, Ltd. Co. ("SPS") is a shortline railroad that, until recently, performed railroad switching operations to serve BNSF's customers in the Lubbock, Texas area. BNSF owns and operates a main railroad line (the "Mainline") through the area.

This case is the latest in an extended string of lawsuits between BNSF and SPS. Since 2002, there have been three previous trials (one in Fort Worth and two in Lubbock) and two appeals (one in Fort Worth and one pending in Amarillo). In addition the parties have participated in several contested matters before the Surface Transportation Board ("STB") in Washington, D.C.

¹ This Motion is filed subject to BNSF's pending Motion for Summary Judgment and Second Motion for Summary Judgment. If granted, those Motions will render this Motion moot.

SPS filed this lawsuit on June 26, 2007, asserting various rights and property interests in BNSF's railroad property located in the Lubbock area and seeking damages and injunctive relief based on those alleged rights. After several amendments, the crux of the case now concerns SPS's ownership claims to various railroad switches in the Lubbock area. BNSF disputes SPS's ownership claims.

In November of 2007, after this suit was filed, SPS was compelled to sell its assets and operations in Lubbock to PYCO Industries, Inc. ("PYCO") under an August 31, 2007, Order of the STB. The Order resulted in the cessation of SPS's business activities, and SPS no longer provides shortline railroad services to BNSF's Lubbock customers. *See Affidavit of Donald E. Herrmann, Ex. A.*

Despite the forced sale of "all properties SAW [SPS] received from BNSF" to PYCO and the discontinuance of its business activities, SPS continues to harass BNSF and PYCO with frivolous claims to railroad properties in the Lubbock area—properties that it either does not now own, or never owned in the first place. In addition to the case at bar, SPS filed a similar suit against PYCO (Cause No. 2008-542,199, also in the 237th District Court of Lubbock County) in which SPS asserted ownership of properties that it was compelled to sell to PYCO. In response PYCO filed a motion with the STB to obtain clarification of the STB's earlier Order that mandated the sale of SPS's assets to PYCO. *See Affidavit of Donald E. Herrmann, Ex. B.* The SPS suit in district court has now been dismissed in deference to the STB proceeding.

Thus, there are now two separate, but overlapping, proceedings that concern the ownership of the contested railroad properties in Lubbock. Pursuant to the doctrine of

primary jurisdiction, and in the interest of fairness, equity and judicial economy, this Court should abate the case at bar pending determination of the property issues being litigated in the STB between PYCO and SPS.

II. ARGUMENT AND AUTHORITIES

In this case, SPS now asserts that BNSF conveyed to it, and that it currently owns, at least the following switches: Track 320 (east and west ends), Track 330 (west), Track 340 (east and west ends), Track 352, Track 9298 and various switches located "at Burris" (hereinafter referred to as the "Burris switches").² SPS asserts various causes of action relying on SPS's alleged ownership of those switches.³

Some or all of these switches are implicated in PYCO's motion currently pending before the STB, where PYCO seeks verification of the STB's earlier Order forcing the sale of all of SPS's assets to PYCO and clarification as to the specific properties that were covered in that Order. Specifically, PYCO's motion seeks verification and clarification as to "all interest in switches," including "Switch 310," "the Burris Track," and "Track 21." See PYCO's Motion at 16. PYCO's motion is based on the proceedings before the STB prior to its August 31, 2007 decision compelling the acquisition of SPS's Lubbock properties by PYCO. Obviously, PYCO and SPS cannot both now own the switches, and their respective ownership rights must be decided before the case at bar can

² SPS asserts rights to the switches at "Track 355 at Burris," "Track 352 at Burris," and "Tracks 7 and 12 at Burris."

³ SPS asserts breach of contract, conversion, and trespass. Each of those causes of action requires proof that SPS currently owns the switches. See *Winchek v American Express Travel Related Servs*, 232 S.W.3d 197, 202 (Tex. App.—Houston [1st] Dist. 2007, no pet.) (breach of contract claim requires proof that there was a valid enforceable contract), *FCLT Loans, L.P. v Estate of Bracher*, 93 S.W.3d 469, 482 (Tex. App.—Houston [14th] Dist.] 2002, no pet.) (conversion requires proof that the plaintiff owned the property in question), *Cain v Rust Indus. Cleaning Servs*, 969 S.W.2d 464, 470 (Tex. App.—Texarkana 1998, pet. denied).

proceed. Otherwise, BNSF is at risk of “double jeopardy” due to the chance of inconsistent rulings.

The Texas Supreme Court has provided that “[t]rial courts should defer to appropriate administrative agencies when (1) the agency is staffed with experts trained in handling complex problems within the agency’s purview, and (2) great benefit is derived from the agency’s uniform interpretation of laws within its purview and the agency’s rules and regulations when courts and juries might reach differing results under similar fact situations.” *In re Sw. Bell Tele. Co., L.P.*, 226 S.W.3d 400, 403 (Tex. 2007) (orig. proceeding).

There can be no question that SPS’s claims as to the Burris switches and the Track 310 switch invoke those circumstances. The STB is staffed with experts who routinely consider the validity and terms of acquisitions between railroad carriers. See 49 U.S.C. § 10501 (jurisdiction of STB); <http://www.stb.dot.gov/> (regarding information as to the STB’s scope and staff). In addition, it is clear that the STB’s uniform interpretation of its orders, including that compelling PYCO’s acquisition of the assets of SPS, provides great benefit. Inconsistent treatment of the rights of the parties resulting from an acquisition will simply lead to judicial inefficiency and economic uncertainty. And, because of the STB’s expertise in legal issues related to railroad carriers and because of its prior experience with the parties’ specific rights as to the properties at issue in this case, the STB is the most appropriate body to decide these issues.

In short, the litigious propensity of SPS has resulted in competing property claims contemporaneously existing in different litigations. It is an untenable situation that can

only be resolved by an Order of Abatement that allows for the orderly determination of the claims.

Respectfully submitted,



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Christopher D. Kruger
State Bar No. 24055805
KELLY HART & HALLMAN LLP
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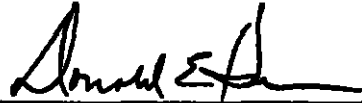
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Telephone: (806) 762-0214
Facsimile: (806) 762-8014

**ATTORNEYS FOR BNSF RAILWAY
COMPANY**

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2008, a true and correct copy of the foregoing document was forwarded via Certified Mail, Return Receipt Requested, to the following:

James L. Gorsuch
James L. Gorsuch, P.C.
4412 74th Street, Suite B-102
Lubbock, Texas 79424



Donald E. Herrmann

CAUSE NO. 2007-539,788

SOUTH PLAINS SWITCHING, LTD. COMPANY	§ § §	IN THE DISTRICT COURT OF
v.	§	LUBBOCK COUNTY, TEXAS
BNSF RAILWAY COMPANY	§ §	237 TH JUDICIAL DISTRICT

AFFIDAVIT OF DONALD E. HERRMANN

STATE OF TEXAS §
 §
COUNTY OF TARRANT §

BEFORE ME, the undersigned authority, on this day appeared Donald E. Herrmann, who is personally known to me, and after first being duly sworn according to law, upon his oath deposed and said:

1. “My name is Donald E. Herrmann. I am over eighteen years of age and legally competent to make this Affidavit. I have personal knowledge of the facts stated herein, and each fact is true and correct.

2. I am an attorney licensed to practice law in the state of Texas, and a partner with the firm of Kelly Hart & Hallman LLP, which was retained by BNSF Railway Company f/k/a The Burlington Northern and Santa Fe Railway Company (“BNSF”) to represent it in the above-referenced matter.

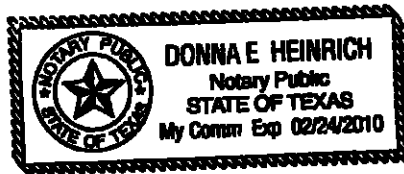
3. Attached as Exhibit A is a true copy of an August 31, 2007, Order of the Surface Transportation Board.

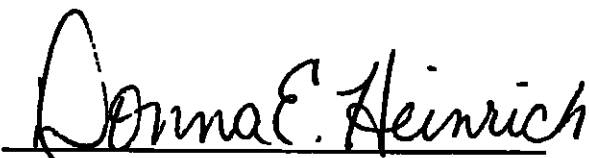
4. Attached as Exhibit B is a true copy of PYCO Industries, Inc.'s Verified Motion for Enforcement or Clarification and Other Appropriate Relief dated February 11, 2008.

5. Further Affiant sayeth not."


DONALD E. HERRMANN

SUBSCRIBED AND SWORN TO BEFORE ME on the 2nd day of April, 2008, to certify which witness my hand and official seal.




Notary Public in and for the
State of Texas